

BEFORE THE CITIZENS' GRAND JURY

THE PEOPLE OF THE UNITED
STATES OF AMERICA

Complainant,

v.

JOSH GERSTEIN
Of Politico, LLC d/b/a Politico.com
headquartered in Arlington, Virginia

Accused.

CRIMINAL INDICTMENT

Case No. 2022- 005

DRAFT

CRIMINAL INDICTMENT

THE CITIZENS' GRAND JURY CHARGES THAT:

I. GENERAL ALLEGATIONS

1. The focus of this particular citizen grand jury indictment is on the theft of and concerted action by JOSH GERSTEIN to steal U.S. government federal property and the resulting threat and danger of serious bodily injury and/or deaths of U.S. citizens, U.S. Supreme Court Justices and/or their families by the publication of a draft opinion of the U.S. Supreme Court in the pending and undecided case of *Thomas E. Dobbs, State Health Officer of the Mississippi Department of Health, Et al. v. Jackson Women's Health Organization, Et al.*, Record No. 19-1392.

2. JOSH GERSTEIN is the Senior Legal Affairs Reporter at Politico.

3. Politico is a newspaper focused on events, development, and news from and about the U.S. Congress, the Federal government, and the political world in the United States of America or news affecting those segments of U.S. society.

4. Politico is currently published on-line on the internet as an informational website

or news magazine website.

5. Politico is a publication of Politico, LLC. See: <https://www.politico.com/terms-of-service>

6. On or about May 2, 2022, JOSH GERSTEIN with ALEXANDER WARD published a news article which included and was written about and around a “1st draft” of a purported decisional “opinion” of the U.S. Supreme Court written by Justice Samuel Alito. *See*, Josh Gerstein and Alexander Ward, "Supreme Court has voted to overturn abortion rights, draft opinion shows," Politico, May 2, 2022, updated May 3, 2022, accessible at:

<https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473>

7. Interestingly, upon the publication of the JOSH GERSTEIN article, before anyone had read it yet, Politico published the article with a photograph of (past) demonstrations outside the U.S. Supreme Court at the top of the article.

8. Thus, JOSH GERSTEIN knew and intended that his theft and publication of the draft U.S. Supreme Court opinion would spark political outrage and demonstrations, if not mayhem, assault, battery and even death at and/or concerning the U.S. Supreme Court by supporters of abortion. Predictably, on or about June 8, 2022, a person appeared at the home of Justice Brett Kavanaugh with a gun intending to murder him as an apparent result of JOSH GERSTEIN’S theft and release of the draft majority U.S. Supreme Court opinion purportedly reversing *Roe v. Wade*. This was the logical result of and a reasonably foreseeable criminal act as caused by the illegal acts of JOSH GERSTEIN as set forth herein.

9. The Politico article provided by an internet hyper-link the complete text of the document at <https://www.documentcloud.org/documents/21835435-scotus-initial-draft>

10. The document stolen and published by JOSH GERSTEIN includes the notation at

the top “1st Draft” and is dated “February ___ 2022” in the caption.

11. The document stolen and published by JOSH GERSTEIN declares that it is written by Justice Samuel Alito as presenting the opinion of the U.S. Supreme Court.

12. The document stolen and published by JOSH GERSTEIN included a routing stamp circulating the draft opinion to the other U.S. Supreme Court Justices, bearing the circulation date of February 10, 2022.

13. The document posted by Politico included JOSH GERSTEIN’s notations by highlighting certain portions of the draft opinion with a box and dull yellow background color.

14. The document posted and widely disseminated by Politico did not include any dissenting opinions or concurring opinions from other U.S. Supreme Court Justices nor customary references in the body of the main opinion to the analyses of dissenting opinions.

15. Thus, the document indicates that it is not the final or formal opinion of the U.S. Supreme Court which includes a formal package of all of the dissenting and concurring opinions of various Justices and in the majority opinion typically refers to and discusses points raised by the dissenting opinions.

16. In the article, JOSH GERSTEIN demonstrated his awareness of and intention for the impact of his actions by writing with his co-author:

No draft decision in the modern history of the court has been disclosed publicly while a case was still pending. The unprecedented revelation is bound to intensify the debate over what was already the most controversial case on the docket this term.

Id.

17. And JOSH GERSTEIN further explained and revealed that his acquisition of the draft opinion was accompanied by his discussions with the source of the document, not merely

acquisition of the document itself:

A person familiar with the court's deliberations said that four of the other Republican-appointed justices — Clarence Thomas, Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett — had voted with Alito in the conference held among the justices after hearing oral arguments in December, and that line-up remains unchanged as of this week.

The three Democratic-appointed justices — Stephen Breyer, Sonia Sotomayor and Elena Kagan — are working on one or more dissents, according to the person. How Chief Justice John Roberts will ultimately vote, and whether he will join an already written opinion or draft his own, is unclear.

The document, labeled as a first draft of the majority opinion, includes a notation that it was circulated among the justices on Feb. 10. If the Alito draft is adopted, it would rule in favor of Mississippi in the closely watched case over that state's attempt to ban most abortions after 15 weeks of pregnancy.

18. Therefore, JOSH GERSTEIN announces and concedes that he had extensive discussions with the source of the document, and he was not merely a passive recipient of a document alone.

19. Writing about his own actions and publication, JOSH GERSTEIN further reported and commented in a follow-up news article:

The disclosure of a [draft opinion in a Supreme Court](#) case is a highly unusual occurrence.

Supreme Court historians, former law clerks and other court watchers say they cannot recall a previous instance before Monday's publication of a draft opinion in the Mississippi abortion rights case.

Josh Gerstein, "How rare is a Supreme Court breach? Very rare," Politico, May 2, 2022, accessible at: <https://www.politico.com/news/2022/05/02/supreme-court-draft-opinion-00029475>

20. And JOSH GERSTEIN further admitted that the purpose of the stolen document being published was to influence the outcome of the U.S. Supreme Court's final decision in the

case.

[A Wall Street Journal editorial](#) Wednesday noted alarm about the potential ruling on the left and expressed concern that Roberts might be “trying to turn” one or both of the court’s newest justices—Barrett and Kavanaugh—to join an opinion that would uphold the Mississippi law without completely abandoning *Roe*. The Journal editorial led [at least one prolific conservative courtwatcher](#) to suspect some sort of leak from the court.

Still, much of what’s known about the inner workings of the court has been driven by leaks or perceived leaks from Supreme Court law clerks — the roughly three dozen attorneys who typically do one-year stints reading briefs and helping draft opinions.

Id.

21. At the start of a television interview by JOSH GERSTEIN on the television network MSNBC with Rachel Maddow, he discusses his and his editors’ high degree of confidence in the source of the leaked information and document, indicating his extensive conversations with the source. This is not a case where a reporter simply received a document out of the blue.

Misti Severi, "WATCH: Reporter speaks about breaking story on Supreme Court abortion rights leak," The Washington Examiner, May 2, 2022, updated May 3, 2022, accessible at: <https://www.washingtonexaminer.com/policy/courts/watch-reporter-speaks-about-breaking-story-on-supreme-court-leak-on-abortion-rights>

22. Illustrating JOSH GERSTEIN’s motivations and professional benefit from these actions, he appeared as a guest on “Meet the Press” on May 8, 2022, to discuss on national television watched by most of the political class of the country these developments. See <https://www.nbcnews.com/meet-the-press/meet-press-may-8-2022-n1295220>

23. Further indicating JOSH GERSTEIN’s motives that stealing and publishing the draft opinion would benefit his partisan political preferences in the upcoming November

elections, he stated on “Meet the Press”--

CHUCK TODD:

You know what he hasn't done, Josh, to keep it sort of in your wheelhouse? He hasn't really commented on the leaked document. You would think he'd say, "Look what my judges did. I told you they'd overturn Roe." And now, maybe he's waiting to make sure it actually happens. But the lack of taking credit, his political antenna to me is telling him this is – he's a little nervous.

JOSH GERSTEIN:

Yeah, you do wonder if he's seeing some of this polling that clearly other Republicans are seeing, saying that this issue may be a loser for them in the fall. And I also wonder in some of these races where Trump's nomination or his endorsement has made the difference, whether when you get to the general election you're going to see candidates try to do a straddle, sort of like Glenn Youngkin did, right, where he was sort of semi-accepting Trump's energy but didn't quite want to appear with him. Can they maintain that straddle all the way to November or

–

Id.

24. And at another point in the “Meet the Press” program, JOSH GERSTEIN underscores his awareness of the dangerous of his actions and the situation he created:

CHUCK TODD:

* * * Josh, let me start with you. Has it sunk in what this, what your report perhaps has done to the Supreme Court for a generation?

JOSH GERSTEIN:

Well, it's starting to. I mean, when that large black imposing fence went up around the Court earlier in the week, it certainly indicated that the Court itself now realizes that whatever decision it issues on this is going to have pretty dramatic, momentous implications and probably is likely to anger a number of people on one side or the other.

Id.

25. JOSH GERSTEIN has decades of journalistic, legal, and political experience

sufficient to inform him both of how to enter into a conspiracy and engage in concerted action to illegally obtain the draft U.S. Supreme Court opinion and of the illegality of conspiring in the theft of the government document.

26. Politico publishes on its website along with news articles, news analysis, and opinion columns published by its authors profile information about those authors. See website page: <https://www.politico.com/staff/joshgerstein>

27. Gerstein's profile page states: "Just before President Barack Obama's inauguration in 2009, Gerstein joined Politico as a White House reporter, returning to a beat he covered as a White House correspondent for ABC News. At ABC, he reported on President Bill Clinton's impeachment and President George W. Bush's response to the terrorist attacks of Sept. 11, 2001."

<https://www.politico.com/staff/joshgerstein>

28. Moreover,

He's also an expert on the Freedom of Information Act and has pursued several such cases, seeking details about alleged abuse of detainees at Guantanamo and the government's handling of leaks of classified information.

Id.

29. And:

Gerstein covers the intersection of law and politics, including Special Counsel Robert Mueller's investigation of President Donald Trump and his associates, as well as ensuing counter-investigations into the origins of the FBI's initial inquiry into the Trump-Russia saga.

While not a lawyer, Gerstein's spent more time in courtrooms and more time reading legal pleadings than many members of the bar.

For more than a decade, he has taken POLITICO readers inside

the most celebrated political trials of our era, involving figures like former Sen. John Edwards (D-N.C.), former White House counsel Greg Craig, longtime Trump confidant Roger Stone and former Trump campaign manager Paul Manafort.

Gerstein served as a contributor to MSNBC for several of those trials. In addition, his reporting and legal analysis has been featured in outlets such as National Public Radio, CNN, Fox News Al Jazeera, the New York Times and the New Republic.

Gerstein also reports on the Justice Department and legal controversies, including Supreme Court showdowns over same-sex marriage and Obamacare, all of the recent Supreme Court nominations, criminal justice reform and battles over executive privilege.

Id.

30. Moreover:

Gerstein began his journalism career in 1991 when he joined CNN's Special Assignment Unit as a researcher and associate producer, according to his LinkedIn page. He stayed with CNN for about three years, and then joined ABC as an investigative reporter and producer in 1995, his profile says. The majority of his career was spent in Washington, DC.

Gerstein held several positions with ABC, where he worked for about eight years, his profile says. He covered Senator Bob Dole's presidential campaign "from start to finish" as a presidential campaign reporter, he wrote on his LinkedIn page.

He then took on a role as a White House reporter for about two years, followed by another two years as a White House correspondent.

He worked in Beijing for about 1 1/2 years as a correspondent for ABC. His Politico profile says that as a Beijing correspondent, he was "reporting from the deserted streets of China's capital during the SARS crisis, on threats to U.S. diplomats in Pakistan and from Afghanistan on the families of Guantanamo prisoners."

He then spent almost five years working for the New York Sun based in the San Francisco Bay Area, his LinkedIn page says.

"From 2003 to 2008, Gerstein was based in northern California

as a national reporter for the New York Sun, covering such stories as Arnold Schwarzenegger’s unorthodox gubernatorial bid and the ins and outs of two presidential elections,” his Politico profile says.

Alyssa Choiniere, “Josh Gerstein: 5 Fast Facts You Need to Know,” Heavy, Updated May 3, 2022, accessible at: <https://heavy.com/news/josh-gerstein/>

31. Moreover, in 2003, when he married, he was the Beijing correspondent for ABC News.

See, WEDDINGS/CELEBRATIONS; June Shih, Josh Gerstein, The New York Times, August 3, 2003, accessible at: <https://www.nytimes.com/2003/08/03/style/weddings-celebrations-june-shih-josh-gerstein.html>

32. From 1995 to 2000, his wife June Shih, was a speechwriter for President Bill Clinton and Hillary Rodham Clinton and later was the chief speechwriter for Mrs. Clinton's senatorial campaign.

Id.

33. Furthermore, also indicating the political motivations and JOSH GERSTEIN’s knowledge of both the wrongfulness and the dangerousness of his actions, his wife’s long-time political, legal, and international knowledge and connections would inform his understanding and his motivations.

Today, Shih is the director of University Communications for NYU Shanghai, according to her NYU profile. Her personal website describes her as a speechwriter, policy consultant and journalist.

“June Shih is a writer and lawyer with more than 20 years’ experience in public policy, communications, and speechwriting,” her website says. “In 1994, she began her career as a cops and courts reporter for a Florida newspaper, but left after a year to assist then-First Lady Hillary Rodham Clinton with her syndicated newspaper column and speeches.”

See, Alyssa Choiniere at Heavy, *infra*.

34.

II. CAUSES OF ACTION

COUNT ONE

Receiving Government Property and Secrets

35. The previous allegations of the entirety of this Indictment are repeated and re-alleged as incorporated herein with the same force and effect as if fully set forth herein.

36. A journalist, like any other citizen, may not participate in the theft of the stolen documents or information, whether classified or private or trade secrets or the like, including a journalist may not entice, encourage, arrange, or conspire in the theft of the documents or information.

37. The U.S. Supreme Court treats drafts of legal decisions as among confidential information and documents, including as pre-decisional governmental documents protected by the governmental deliberative process privilege and under the laws similar to trade secrets and proprietary information.

38. Judicial clerks who assist U.S. Supreme Court Justices must sign contracts and pledges of confidentiality that include the confidentiality of such drafts, among many other confidential information.

39. 18 U.S.C. 641 criminalizes this conduct;

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property in the aggregate, combining amounts from all the counts for which the defendant is convicted in a single case, does not exceed the sum of \$1,000, he shall be fined under this title or imprisoned not more than one year, or both.

The word “value” means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

40. The U.S. Court of Appeals for the District of Columbia Circuit has held that information can be a thing of value under 18 USC 641. *See United States v. Collins*, 56 F.3d 1416 (D.C. Cir. 1995). *See also*, Jessica Lutkenhaus, “Note: Prosecuting Leakers the Easy Way: 18 U.S.C. § 641,” *Columbia Law Review*, Vol. 114:1167, accessible at: <https://t.co/38NqjbcCSJ>. *See, also*, Chinwe Chukwuogo, “[News] The Clerk, The Thief, His Life As A Baker: Visiting Judge Tells Story of 1919 Supreme Court Leak,” University of Chicago Law School, July 20, 2016, accessible at: <https://www.law.uchicago.edu/news/clerk-thief-his-life-baker-visiting-judge-tells-story-1919-supreme-court-leak>

41. In *United States v. DiGilio*, defendants were convicted of violating the statute for photocopying documents in an FBI file. They appealed the conviction, arguing that because they only removed copies of the documents and never deprived the FBI of their use, they did not break the law.

42. The Federal Court of Appeals for the Third Circuit upheld the conviction, holding that a “duplicate copy is a record for the purposes of the statute, and duplicate copies belonging to the government were stolen.” *See, United States v. DiGilio*, 538 F.2d 972 (3rd Cir. 1976)

43. 18 U.S. Code § 207 requires that:

- (a) Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record,

proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined under this title or imprisoned not more than three years, or both.

- (b) Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined under this title or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any office under the United States. As used in this subsection, the term “office” does not include the office held by any person as a retired officer of the Armed Forces of the United States.

44. 18 U.S.C. 2315 also criminalizes the knowing receipt of stolen goods:

Whoever receives, possesses, conceals, stores, barter, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of \$5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of \$500 or more, which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken; or

Whoever receives, possesses, conceals, stores, barter, sells, or disposes of any falsely made, forged, altered, or counterfeited securities or tax stamps, or pledges or accepts as security for a loan any falsely made, forged, altered, or counterfeited securities or tax stamps, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited; or

Whoever receives in interstate or foreign commerce, or conceals, stores, barter, sells, or disposes of, any tool, implement, or thing used or intended to be used in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing that the same is fitted to be used, or has been used, in falsely

making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof; or

‘Whoever [1] receives, possesses, conceals, stores, barter, sells, or disposes of any veterans’ memorial object which has crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken—’ [1]

Shall be fined under this title or imprisoned not more than ten years, or both. If the offense involves a pre-retail medical product (as defined in section 670) the punishment for the offense shall be the same as the punishment for an offense under section 670 unless the punishment under this section is greater. If the offense involves the receipt, possession, concealment, storage, barter, sale, or disposal of veterans’ memorial objects with a value, in the aggregate, of less than \$1,000, the defendant shall be fined under this title or imprisoned not more than one year, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of an obligation or other security of the United States or of an obligation, bond, certificate, security, treasury note, bill, promise to pay, or bank note, issued by any foreign government. This section also shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of any bank note or bill issued by a bank or corporation of any foreign country which is intended by the laws or usage of such country to circulate as money.

For purposes of this section, the term “State” includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States. For purposes of this section the term “veterans’ memorial object” means a grave marker, headstone, monument, or other object, intended to permanently honor a veteran or mark a veteran’s grave, or any monument that signifies an event of national military historical significance.

COUNT TWO

Conspiracy to Steal Government Property and Secrets

45. The previous allegations of the entirety of this Indictment are repeated and re-alleged as incorporated herein with the same force and effect as if fully set forth herein.

46. 18 U.S.C. 371 criminalizes this conduct;

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

We the Citizens' Grand Jury find probable cause that putative defendant Josh Gerstein has committed all of the crimes as set forth herein.

A TRUE BILL

FOREPERSON

LARRY KLAYMAN

Citizen's Grand Jury Prosecutor